

May23, 2016

Reference Number: 16-0024

Ms. JoAnne Reed  
CEO  
J.C. Smith, Inc.  
REDACTED  
Syracuse, NY 13210

Dear Ms. Reed:

J.C. Smith, Inc. (JCS) appeals the New York State Unified Certification Program's (NYSUCP)<sup>1</sup> determination that the firm is no longer eligible to be certified as a Disadvantaged Business Enterprise ("DBE"), under the criteria set forth in 49 CFR Part 26 ("the Regulation"). After a careful review of the entire administrative record, we affirm. *See* §26.89(f)(1).<sup>2</sup>

Specifically, we affirm NYSUCP's decertification because it is supported by substantial evidence and not inconsistent with the substantive or procedural provisions of the Regulation. *See* §26.89(f)(1). The record supports NYSUCP met its burden of proving that the firm does not meet the provisions of §§26.71(e), (f), and (k).<sup>3</sup>

#### I. Procedural history

NYSUCP certified JCS as a DBE in 2010. It conducted a new On-Site certification review on June 25, 2014, and the certifier issued its notice of intent to decertify the firm on March 18, 2015. JCS responded to its proposed decertification in writing on April 15, 2015. JCS also elected to respond in person during an informal hearing, which occurred on June 25, 2015. NYSUCP issued its notice of decertification on August 6, 2015. JCS appealed its decertification on October 29, 2015.

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<sup>1</sup> The New York State Department of Transportation decertified JCS. NYDOT is a member of the NYSUCP.

<sup>2</sup> §26.89(f)(1) states: "The Department affirms your decision unless it determines, based on the entire administrative record, that your decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification."

<sup>3</sup> We affirm the firm's decertification based on §§26.71 (e), (f), and (k). It is unnecessary that we examine the other decertification grounds that are presented in this case.

## II. Facts

The facts are uncontroverted. John C. Smith, Jr. founded JCS in 1976. The firm supplies, rents and repairs contracting equipment.

Mr. Smith gradually divested all of his ownership interest to various family members. Between 1990 and 1992, Mr. Smith gifted 17 shares each—51 shares in total—to you and your non-disadvantaged brothers REDACTED. Mr. Smith later retired and transferred his remaining 50 shares to your mother, REDACTED. In 2011, Jeff transferred his 17 shares to his wife REDACTED. After your mother's death, her 50 shares (16  $\frac{2}{3}$  each) passed by will to you and your brothers REDACTED. REDACTED then transferred 1 share to REDACTED to keep JFS's disadvantaged ownership above 51%. JCS's history of share ownership is contained within the table below:

REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED
5/1976	101	-	-	-	-	-	(101)
	101	-	-	-	-	-	-
12/21/1990	(18)	-	-	6	6	6	-
	83	-	-	6	6	6	-
12/31/1991	(15)	-	-	5	5	5	-
	68	-		11	11	11	-
12/31/1992	(18)	-	-	6	6	6	-
	50	-	-	17	17	17	-
7/20/1994	(50)	50	-	-	-	-	-
	0	50		17	17	17	-
2/14/2011	-	50	17	-	(17)	-	-
	-	50	17	17	-	17	-
2/10/2014	-	(50)	-	16 $\frac{2}{3}$	16 $\frac{2}{3}$	16 $\frac{2}{3}$	-
	-	-	17	33 $\frac{2}{3}$	16 $\frac{2}{3}$	33 $\frac{2}{3}$	-
2/10/2014	-	-	1	-	-1	-	-
	-	-	18	33 $\frac{2}{3}$	15 $\frac{2}{3}$	33 $\frac{2}{3}$	-
	-	-	-	-	-	-	-
<b>Present</b>	<b>0</b>	<b>0</b>	<b>18</b>	<b>33 <math>\frac{2}{3}</math></b>	<b>15 <math>\frac{2}{3}</math></b>	<b>33 <math>\frac{2}{3}</math></b>	<b>0</b>

The roles and relevant experience of JCS's owners are as follows:

A. JoAnne Reed (33 2/3% owner)

You are JCS's 34% owner CEO. You have worked full-time at the firm since 1990 and ascended from the position of Treasurer to CEO after your mother's death. Your daily responsibilities at JCS primarily involve securing the firm's financial security. You work on accounts receivables, account reconciliation, collections, and debt management. You are also JCS's human resources coordinator. As CEO, you state that you have the final authority on all business decisions.

The record does not reflect that you had relevant experience or education in JCS's business areas before you joined the firm.

B. Mary Smith (18% Owner)

REDACTED—Jeff's wife—is JCS's 18% owner and Vice President. She assumed her role as Vice President after your mother's death. Mary began her career at JCS as an Accounts Payable Clerk in 1988. After leaving the firm for 9 years to raise her children, Mary returned in 2000 to the firm and assumed her current role as Accounts Receivable Clerk. In this position, she resolves accounts receivables issues and works closely with Jay Smith.

The record does not reflect that Mary had relevant experience or education in JCS's business areas before working at JCS.

C. Jeffrey Smith (15 2/3% owner)

Jeff Smith worked for JCS since it was formed in 1976. Jeff initially performed odd jobs for the firm as a driver, counterman, and salesperson. During this time, he also made wire rope and hydraulic hoses. In 1998, Jeff became the firm's Vice President and Sales Manager. Currently, Jeff is the firm's President and he is responsible for its sales operations. Specifically, Jeff supervises JCS's salespersons and 5 retail stores. In this capacity, he works on personnel issues and onsite monitoring of the stores.

Jeff obtained an Associate degree in Business Administration from the State University of New York at Morrisville. Jeff has also taken several relevant courses in JCS's business areas including Paulson Wire Rope, Ditch Witch, Stihl, Pentax Surveying Equipment, and Nikon Surveying Equipment.

D. Jay Smith (33 2/3% owner)

Jay Smith has worked at JCS since 1977 and has performed numerous duties while at the firm. Jay, similar to Jeff, began his career with the firm performing odd jobs/tasks—e.g. driver, made wire rope slings, hydraulic hoses, and counterman. Jay then worked as a Rental Manager, Purchasing Manager, and Credit Manager until he reached his current positions as the firm's Secretary and "Financial Affairs Officer." As Financial Affairs Officer, Jay oversees the firm's purchasing and inventory control for headquarters and JCS's five retail stores. Jay also has sales and human resource responsibilities within JCS's retail stores.

Jay Smith has an Associate degree in Business Administration from the State University of New York at Morrisville. In addition, he has also taken relevant courses including Paulson Wire Rope, Spector-Physics – Lasers, Homelite, Stihl, Dale Carnegie Course.

NYSUCP decertified JCS primarily based on its inability to conclude that you and Mary maintain the requisite control over firm. JCS argues that its disadvantaged owners maintain final authority over all of the business's affairs and therefore meet the Regulations' control requirements.

### III. Discussion

In decertification proceedings, a Recipient bears the burden to prove, based on the preponderance of evidence, that a firm is no longer eligible to be certified as a DBE. §26.87(d)(1).

#### A. Family control

The record contains ample evidence to support that NYSUCP met its burden of proof that JCS's disadvantaged owners do not—"as distinct from the family as a whole—control the firm." See §26.71(k) (family control provision).

Ms. Reed and JoAnne Smith both indicated during the informal hearing that the Smith family collectively controls JCS.<sup>4</sup> The record also indicates that several nondisadvantaged family members each control major portions of the firm's business operations—e.g. Jay Smith (purchasing), Jason Smith (sales), Lance Reed (General Manager/retail store operations).<sup>5</sup> The degree of responsibility that is equally distributed amongst the family—as discussed in section B and C below— supports NYSUCP's conclusion that JCS is ineligible on the basis of §26.71(k).

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<sup>4</sup> See Hearing Transcript at 12 ("Mary Smith: You know what's hard to explain and make sense for you guys is that being a **family-run business** and being small, you know, we kind of take, Joanne and I have kind of taken on things the more that we've been involved.") (Emphasis added)

*See also id.* at 15( **NYSUCP**: Yeah. Because I just wanted... You know, to go back to my previous question about what's the distinction between... You know, he owns 33 percent shares and some of the same functions, he has similar functions that you have, Joan (sic), based on the resume. **Joanne Reed**: Well, he may have some of the same functions as I do but that's just because we all have to cross reference. Again, we're a family business. I mean, we all do, you know, stuff together. We all have to know, God forbid something happens to one of our family members or something, you know, someone's got to be able to back the other one up. ") (emphasis added)

<sup>5</sup> Lance Reed—Ms. Reed's husband— also exercises control over the firm's retail operations. Mr. Reed is JCS's General Manager of stores and was on the firm's board of directors—acting as Treasurer—before he resigned to avoid potential control issues created by his voting rights.

JCS's assertion that ultimate decisions rest within Ms. Smith's authority, does not offset evidence of indistinguishable family control.<sup>6</sup> However, as noted in NYSUCP's intent to decertify letter, many responsibilities—including signatory authority—is shared amongst disadvantaged and non-disadvantaged family members.

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#### Summary of Primary Functions

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<u>Function</u>	<u>DBE Application</u>	<u>On-Site</u>
Financial Decisions	Joanne Reed/ Jay Smith	Jeffrey Smith
Estimating and Bidding	Gerald Hartness	Gerald Hartness and Jeffrey Smith
Hiring and Firing (Mgmt)	Joanne Reed/Lance Reed	Jay Smith, Jeffrey Smith, Joanne Reed, Mary Smith
Office Management	Rosemary Liss and Mary Smith	Joanne Reed and Mary Smith
Marketing/Sales	Jeffrey Smith	Jeffrey Smith
Purchasing of Major Equipment	<i>Board of Directors Collectively</i>	Not asked
Authorized to Sign Checks	Joanne Reed, Rosemary Liss, Jay Smith, Jeffrey Smith, Lance Reed and Mary Smith	Not asked
Authorized to make Financial Decisions	Joanne Reed, Rosemary Liss, Jay Smith, and Mary Smith	Jay Smith, Jeffrey Smith, Joanne Reed, Mary Smith

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<sup>6</sup> See Hearing at 11. (“**Joanne Reed:** Well, Jeff can’t make any decisions without Mary, without myself. That’s the difference and, basically if there’s something that has to be done, he has to report back to me and the board. He can’t just be doing things.”) See also, id. at 15. You state that the difference between your role at the firm compared to other family members is that your “vote is the final vote and that’s the difference between these job titles.”

During the hearing, however, you acknowledge that Jay Smith, Lance Reed has authority to sign on behalf of the company and has signature authority on all of the firm’s accounts. The signatory authority of Mr. Smith and other members of your family weaken your claim that your non-disadvantaged family members cannot act or make decisions on the firm’s behalf without your consent.

See Hearing Transcript at 12: **Mary Smith:** I think part of the issue is that... I don’t know how much you guys deal with a multi-generational business. I don’t know if this has come up before or if we’re kind of a strange breed, but you know, in this type of a setting, you know, you have another generation that’s just come up through the ranks and now we’re starting on our third generation, which is our children, and you have to be able to multitask and cross train for them to learn things and move up into the business to be able to take it over when we decide we’re going to leave. So I don’t know how much of that you guys deal with on a daily basis with what you’re doing but we hope that kind of helps explain where we’re coming from as far as what each of us does and how somebody else can still do that as well.

NYSUCP Intent to Decertify Letter (March 18, 2015) at 6.

The Regulation clearly states “If it is unclear “that the socially and economically disadvantaged owners—as distinct from the family as a whole—control the firm, then the socially and economically disadvantaged owners have failed to carry their burden of proof concerning control, *even though they may participate significantly in the firm’s activities*”) (emphasis added).<sup>7</sup> The record supports the firm’s decertification based on family control. We therefore affirm. See §26.89(f)(1).

#### B. Disproportionate control

Under the Regulation, “individuals who are not socially and economically disadvantaged or immediate family members may be involved in a DBE firm as . . . managers [and] employees . . . officers, and/or directors. Such individuals must not, however possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.” §26.71(e).

In this instance, Jeffrey and Jay Smith use their knowledge and expertise that they obtained through educational courses and work experience to control the JCS’s sales, purchasing, and retail store operations. The record supports that non-disadvantaged individuals control critical portions of the firm’s business (e.g. purchasing, sales, estimating/bidding, and store operations). You and Mary even indicated during the informal hearing and onsite that you are still learning to take on the functions left open by your late mother. See Hearing at 16 .<sup>8</sup>

The record therefore supports that non-disadvantaged individuals possess the ability to control or disproportionally control the firm. We affirm under §26.89(f)(1).

#### C. Delegation.

The Regulation does not prohibit a disadvantaged owner from delegating responsibilities to non-disadvantaged employees. However, “the managerial role of the socially and economically disadvantaged owners in the firm’s overall affairs must be such that the recipient can *reasonably conclude* that the socially and economically disadvantaged owners actually exercise control over the firm’s operations, management, and policy.”

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<sup>7</sup>See also id. at 16: **Mary Smith:** I think part of the issue is that... I don’t know how much you guys deal with a **multi-generational business**. I don’t know if this has come up before or if we’re kind of a strange breed, but you know, in this type of a setting, you know, you have another generation that’s just come up through the ranks and now we’re starting on our third generation, which is our children, and you have to be able to multitask and cross train for them to learn things and move up into the business to be able to take it over when we decide we’re going to leave. So I don’t know how much of that you guys deal with on a daily basis with what you’re doing but we hope that kind of helps explain where we’re coming from as far as what each of us does and how somebody else can still do that as well. (emphasis added)

<sup>8</sup> We acknowledge you and Ms. Reed play a significant role in managing the firm’s financials/administrative affairs—although Jay maintains the title of Financial Affairs Officer—the record, however, supports that you both are not substantially involved in the other core areas of the firm’s operations.

In this instance, non-disadvantaged individuals are each in charge of specific operations and management within JCS business areas. Jeff and Jay—who each have a breadth of experience and expertise in the specific operational areas that they control—seemingly have autonomous control over their respective areas.<sup>9</sup> In addition, Jeff and Jay each have signatory authority, which indicates that they can commit the firm to binding agreements without your consent.

In summary, the evidence supports that the delegation of authority is “such that the recipient cannot *reasonably conclude* that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy.” We affirm. *See* §26.89(f)(1).

#### IV. Conclusion

We affirm JDA's decertification because it is supported by substantial evidence, and because it is consistent with the Regulation's substantive or procedural certification provisions.

This decision is administratively final and not subject to petitions for review.

Sincerely,

Samuel F. Brooks  
DBE Appeal Team Lead  
External Civil Rights programs Division

cc: NYSUCP

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<sup>9</sup> *See* Hearing Transcript at 12: **Mary Smith:** You know Jeff is one of the key people in the company. I mean he's been with us since day one. He's also been the outside salesman. He started as a salesman. So he's kind of part of that good ole boys' club. People look to him for information because he's always been out there.